No. 90-522

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PATRICK J. MCNAMEE AND JOSEPHINE MCNAMEE, h/w,
Petitioners

v.

SOUTHERN TEXTILE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Did the Court of Appeals for the Third Circuit err in holding that state law had no bearing on what activities constitute "business" for the purpose of demonstrating citizenship of a corporation under 28 U.S.C. §1332(c)?

2. Did the Court of Appeals for the Third Circuit err in affirming the judgment of a district court, which had held that the activity of prosecuting and defending lawsuits could be considered "business" for the purposes of determining that court's diversity jurisdiction under 28 U.S.C. §1332 (c) over a manufacturing company that had ceased manufacturing operations?

3. In the case of a corporation that is no longer pursuing the purpose for which it was formed, or any activity which produces goods or services for pecuniary gain, which among the tests developed by the circuit and district courts, should be used for determining "principal place of business" citizenship under 28 U.S.C. §1332(c)?

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No. 90-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Patrick J. McNamee and Josephine McNamee, husband and wife, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 28, 1990, rehearing denied on July 30, 1990, which affirmed the judgment of the United States District Court for the District of New Jersey, holding that a manufacturing corporation that liquidates its assets, and only engages in the prosecution and defense of lawsuits, can change its "principal place of business" for the purposes of diversity jursisdiction under 28 U.S.C. § 1332(a)(1), to the location where this latter activity is centered, whether or not it complies with state laws regulating such corporations, and in support thereof represent the following:

OPINION BELOW

The opinion of the United States District Court for the District of New Jersey is not officially reported and is reproduced in the Appendix hereto. (App. A-9) The judgment of the United States Court of Appeals for the Third Circuit affirming the lower court decision is not officially reported and is reproduced in the Appendix hereto. (App. A-10) The judgment of the United States Court of Appeals for the Third Circuit denying the petition for rehearing is also reproduced in the Appendix hereto. (App. A-16)

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, dated June 25, 1990, was entered on June 28, 1990. The petition for rehearing was denied July 30, 1990. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §1332 (a) (1) and 28 U.S.C. §1332 (c), effective on the original date of filing of this suit, November 5, 1988:

Section 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(c) For the purposes of this section and 1441 of this title [28 USCS §1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business:

Legislative History:

Senate Report No. 1830, to accompany H.R. 11102, 185th Congress, 2d Session, 2 U.S. Code Cong. & Ad. News 3101, 3102 (1958)

STATEMENT OF THE CASE

The petitioners, Patrick J. McNamee and Josephine McNamee, his wife, commenced an action for personal injuries in the United States District Court for the Eastern District of Pennsylvania on December 5, 1988. The action arose from allegations by the petitioner, Patrick J. McNamee, that he was injured as a result of long-term exposure to asbestos materials.

The petitioners' complaint, filed pursuant to 28 U.S.C. §1332(a), alleged that the amount in controversy exceeded $10,000 and that there was diversity of citizenship between the petitioners and all defendants, including the respondent. The petitioners alleged that they are citizens of Pennsylvania and that the respondent, Southern Textile Corporation ("Southern") is a business entity incorporated under the laws of Delaware. In accordance with the petitioners' Master General Long Form Complaint, authorized pursuant to an Order dated August 20, 1986, by the Honorable Charles L. Weiner, the petitioners alleged that Southern's principal place of business was in North Carolina.

On April 12, 1989, Southern moved to dismiss on the ground that its principal place of business is in Pennsylvania. Southern attached two affidavits in support of its motion. These affidavits of Michael J. Mocniak and David Howes averred that they were agents of Southern, that Southern no longer actively conducted manufacturing operations, and that the meetings of the corporations were held at 801 Grant Street, Pittsburgh, Pennsylvania. (App. A-17 & A-18)

On April 24, 1989, the Honorable Charles L. Weiner conditionally granted Southern's motion to dismiss. The Court permitted petitioners to take additional discovery before the matter was dismissed with prejudice. (App. A-1)

On May 23, 1989, the deposition of David Howes was taken at the law office of his counsel, White and Williams. Mr. Howes identified himself as Assistant Counsel of H.K. Porter Company ("Porter"). (App. A-20) He identified himself as agent for Southern in affidavits dated March 28 and June 23, 1989. (App. A-18 and A-29)

According to Mr. Howes, Southern Asbestos Company came into existence in 1974 as a wholly owned subsidiary of Porter. (App. A-20) No one else owns any stock in Southern Asbestos Company. (App. A-23) In January, 1979, its name was changed to Southern Textile Corporation. (App. A-21) Southern maintained manufacturing plants in Charlotte and Bennettsville, North Carolina. Southern neither used nor owned any other manufacturing plants. Southern was incorporated as a Delaware corporation. (App. A-21 - A-32)

Southern's only assets are cash and insurance coverage. It owns no real estate, has no personal property, has no office anywhere with its name on the door, pays no rent, and has no employees. It neither sells nor purchases any goods or services. Southern merely engages attorneys to defend and amend asbestos lawsuits and obtains the annual services of an accounting and auditing firm. (App. A-22 - A-24)

Southern does not conduct any transactions for pecuniary benefit in Pennsylvania, or for that matter, in any other state. In fact, Southern has never filed a certificate of authority to do business in the Commonwealth of Pennsylvania. (App. A-28)

Southern sold its North Carolina manufacturing facilities to a company that Howes believes is unconnected with Porter. (App. A-25) According to Howes, the "business" that Southern conducts is the defense of asbestos personal injury litigation. (App. A-26) The last time that Southern engaged in business, that is, the manufacture of goods for sale or rendering of services for profit—other than the defense of asbestos litigation—was in 1983, when Southern sold its North Carolina assets. (App. A-26 & A-27)

After this deposition, the petitioners filed a motion for reconsideration alleging that diversity existed between the parties. The Howes deposition was presented as support for the petitioners' position. On July 12, 1989, Judge Weiner filed a memorandum opinion and order in which he concluded that Southern's principal place of business was in the Commonwealth of Pennsylvania and that there was lack of diversity between it and the petitioners. The order denied the plaintiffs' motion for reconsideration and vacated the April 24 order, transferring the

petitioners' complaint with respect only to respondent, Southern, to the United States District Court for the District of New Jersey, or to the state court, at the option of the petitioners. (App. A- 7)

By order filed July 19, 1989, Judge Weiner transferred the matter to the United States District Court for the District of New Jersey. The matter with respect to all other defendants would remain in the United States District Court for the Eastern District of Pennsylvania. (App. A-8)

On December 26, 1989, upon application of Southern, the Honorable Alfred M. Wolin of the United States District Court for the District of New Jersey, entered an order dismissing the complaint as to the respondent, Southern, for lack of subject matter jurisdiction due to lack of diversity between the petitioners and respondent, Southern. (App. A-9)

Upon timely appeal, the United States Court of Appeals for the Third Circuit affirmed the decision of the district court on June 28, 1990, holding that respondent was an active corporation involved in the prosecution and defense of numerous asbestos-related lawsuits, with its principal place of business in Pennsylvania. (App. A-15) Petitioner's timely petition for rehearing was denied on July 30, 1990. (App. A-16)

REASONS FOR GRANTING THE PETITION

The issue of a corporation's citizenship was first argued before the United States Supreme Court almost one hundred years ago. *St. Louis and San Francisco Railway Company v. James,* 161 U.S. 545 (1896). In *James*, the Supreme Court held that, for purposes of diversity of citizenship, a corporation is a citizen of the state in which it is incorporated. *Id.* at 563. Thus the genesis of the modern day rule regarding diversity cases involving corporate parties, started by declaring that diversity was determined solely by "citizenship," (defined as that state where incorporation was achieved).

In 1958, Congress, attempting to modernize federal practice, amended 28 U.S.C. §1332(c) to make a corporation a citizen of *both* the state of incorporation *and* its principal place of business. While the statute contains the implicit assumption that all corporations have a principal place of business, (*see, Inland Rubber Corporation v. Triple A Tire Service, Inc.*, 220 F. Supp. 490, (S.D.N.Y. 1963)), the problem of interpretation among the various circuits has been how to define either "principal place" or "business". The inconsistency of opinion expressed by the circuit courts, combined with the other considerations discussed below, strongly suggests that the Supreme Court must now decide the issue of proper definition and determination of corporate citizenship for purposes of diversity jurisdiction. Sup.Ct.R. 10(1)(a).

A. THE THIRD CIRCUIT'S DECISION THAT PENNSYLVANIA STATUTES DO NOT BEAR ON THE DETERMINATION OF APPELLEE'S TYPE OF BUSINESS, OR PRINCIPAL PLACE OF BUSINESS, IS INCONSISTENT WITH THIS COURT'S DECISIONS, AND HAS IMPLICATIONS FAR BEYOND THIS CASE.

On page 6 of the Third Circuit's decision in this case, the Court states "Moreover, the Pennsylvania Statutes on the conduct of business by foreign corporations to which plaintiffs refer do not bear on this determination, because the determination is controlled by Federal law, not state law. *Mas,* 489 F.

2d at 1399." *McNamee et ux v. Celotex, et al.*, No. 90-5043 (3d Cir. June 28, 1990); (App. A-14).

It is well established that a corporation engages in different types of "doing business," which are treated differently for the purposes of jurisdiction. In *Green v. Chicago, Burlington & Quincy Railroad Co.*, 205 U.S. 530 (1906), this Court stated: "It is obvious that the defendant was doing there, a considerable business of *a certain kind*, although there was no carriage of freight or passengers." *Id.* at 533 (emphasis added). The Court went on to hold that the defendant railroad could not be considered to be doing business in New York because of the *type* of business it was doing there. *Id.* at 534.

A similar distinction was recognized in *Buffalo Batt & Felt Corporation v. Royal Manufacturing Co.*, 27 F.2d 400 (W.D.N.Y. 1928): "In both the Federal and the New York state cases it is stated that an essential part of business of the foreign corporation, or *some substantial part of its main business*, must be done within the state, to justify the service of process upon its representatives there." *Id.* at 401 (emphasis added).

The relationship between state law and the character of a Corporation is also well established. In *CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69 (1986), this Court stated: "We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *Id.* at 89. The Court went on to quote Chief Justice Marshall in *The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819):

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Id.* at 636.

While the Third Circuit is *generally* quite correct in that a Federal Court is not bound by state law in determining a corporation's principal place of business, the Court erred in deciding that state statutes have no bearing on the decision. Under the precedents discussed above, state law has a clear bearing on what types of "doing business" are significant, and non-compliance with state laws regarding conduct of business within a state is evidence of whether or not a corporation, being a creature of state law, has an intention of establishing, or whether in fact it has a principal place of business within a state.

In allowing a corporation to choose a type of "business," and a place of business, without the burden of appropriate compliance with state law, the Third Circuit's decision lays open the opportunity of forum shopping and manipulation of both diversity jurisdiction and venue by corporations.

B. THIS THIRD CIRCUIT DECISION RAISES IMPORTANT FEDERAL QUESTIONS, AND HAS IMPLICATIONS FAR BEYOND THE INDIVIDUAL CASE.

1. The decision raises an important Federal question of substance which has not previously been determined by this Court.

The issue of whether "prosecuting and defending lawsuits" can be considered to be the type of "doing business" significant for determining "principal place of business" for diversity jurisdiction, has not been previously explored. In a time when many corporations are experiencing financial difficulties that result in a liquidated state similar to respondent in this case, the Third Circuit's decision opens the door for manipulation of venue and jurisdiction in many other cases. Thus, the issue is both important and novel and Certiorari should be granted under the policy of *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945): to wit, "Certiorari was granted because that Court decided an important Federal question of substance which had not previously been determined by this Court." *Id.* at 715.

2. If the Respondent's reasoning, as endorsed by the Third Circuit's decision, is taken to its logical conclusion, Respondent's citizenship will change randomly.

Only law firms, and possibly insurance companies, can be in the business of prosecuting and defending lawsuits. Although it does not appear in the record, it is highly unlikely that respondent is either qualified or licensed for either of these activities.

A far more important issue, however, is the circular effect of this determination:

If the respondent's business is prosecuting and defending lawsuits, then it's principle place of business would be the location where most of these lawsuits are filed, under the "place of operations" test recognized by the Third Circuit, among others. *See Kelly v. United States Steel Corporation*, 284 F.2d 850, 854 (3d Cir. 1960). An event consolidating a significant number of respondent's cases in one place such as a national federal asbestos class action, could instantly change its citizenship to that place, an absurd result considering that the subject matter of the lawsuits is related to respondent's inactive business of asbestos product manufacture, not its purported new "business" of prosecuting and defending lawsuits. This illustrates the inherent danger of allowing an inactive or liquidating corporation to establish a new business involving the lawsuits derived from its active phase.

This court should establish the rule of law for determining citizenship under 28 U.S.C. § 1332(c) for corporations that have ceased pursuing the function for which they were formed, and are now concentrating their efforts on collateral functions. The rules in either *Gavin v. Read Corp.*, 356 F. Supp. 483, (E.D. Pa. 1973), *aff'd* 523 F.2nd 1050 (3d Cir. 1975) (such a corporation being a citizen only of it's state of incorporation, *Id.* at 486-87) or *Wm. Passalacgua Builders, Inc. v. Resnick Developers South, Inc.*, 608 F. Supp. 1261 (S.D.N.Y. 1985) (such a corporation being a citizen of the state where it last conducted significant business activity, *Id.* at 1263) would establish a more objective and predictable standard.

3. The decision affects a considerable number of suits in the lower courts.

Petitioner's attorney represents plaintiffs in over fifty (50) cases in the District Court for the Eastern District of Pennsylvania which are affected by the Third Circuit's decision. Additionally, many other cases filed in Federal District Courts in Pennsylvania naming respondent as defendant are similarly affected. A Writ of Certiorari should therefore be granted under the doctrine espoused by this Court in *Massachusetts Trustees of Eastern Gas and Fuel Associates v. U.S.*, 377 U.S. 235 (1964):

> "Because a considerable number of suits are pending in the lower courts which will turn on resolution of these issues, and because of a conflict among the circuits as to the first issue, we brought the case here." *Id.* at 237.

C. CIRCUITS ARE INCONSISTENT IN THEIR DECISIONS ON SIMILAR CASES.

In each of the cases we now consider, the corporate "party" has in some fashion ceased doing business (defined here as providing goods or services for pecuniary gain) or is finalizing it recent business affairs. It is within these types of factual peculiarities that the courts run aground in their varying interpretations as to the current corporate citizenship status of that litigating party. In the confusion three different "tests" have developed. These are gleaned by a reading of the various decisions. The "tests" are: a) State of Incorporation; b) Forum of Last Business Activity; and c) Forum of Corporate Conclusion.

1. State of Incorporation Test

In *Gavin* the district court took a unique approach to the problem. Faced with reaching a determination as to the "correct" corporate citizenship of a now lifeless corporate entity the Court ruled that for purposes of diversity jurisdiction it would look only to the state of incorporation to determine this citizenship status. In *Gavin*, the defendant was incorporated in Delaware and had had a principal place of business in Pennsylvania. In January 1970 when the plaintiff, a Pennsylvania resident,

instituted suit against the defendant in federal court, defendant, Read Corporation, had ceased operation and transferred its assets to another corporation. However, it maintained its incorporation in Delaware. The court held that, although defendant may have had a principal place of business in Pennsylvania, after its dissolution and the cessation of business activity in Pennsylvania defendant was a citizen of it's state of incorporation. 356 F. Supp. at 487.

Sanders Company Plumbing and Heating, Inc. v. B. B. Anderson Construction Company, Inc., 660 F. Supp. 752 (D. Kan. 1987) follows the same reasoning. In *Sanders*, the defendant, a construction company, was incorporated in Kansas. However, due to financial difficulties, defendant "entered into a sort of lease agreement with B.B. Anderson Construction Company, a Missouri corporation, that operated out of an office in Kansas City, Missouri". Id. at 753. Here the district court held that a corporation in the process of winding down, does not truly have a "principal place of business." Id. at 754. Although Anderson was winding down its business through a Missouri corporation, the court held that the defendant's citizenship was that of the state of its incorporation, Kansas.

2. Forum of Last Business Activity

In *Comtec, Inc. v. National Technical Schools*, 711 F. Supp. 522, (D.Ariz. 1989), the plaintiff, Comtec, a Nevada Corporation, brought suit in the Arizona district court against National Technical Schools, a Delaware Corporation operating in California. The court held that, although all of its business activity had ceased, Comtec was as a conclusion of law a citizen of California, because Comtec's principal place of business had been California. This determination was made based upon a review of Comtec's prior business activity. Therefore, reasoned the court, there was no diversity because both Comtec and National Technical Schools were California citizens. *Id.* at 525.

Similarly, in *William Passalacqua*, the district court held that the principal place of business of a corporation that is inactive at the beginning of a lawsuit, is in the state of the corporation's last business activity. 608 F. Supp at 1263.

More confusing yet are the few cases creating a slightly different approach in which the court chooses not the forum where the corporate headquarters is located but rather makes a clear distinction between "corporate" activity and the situs where the principal activity is conducted. We might define these cases under the sub-category called the "Forum of Last Principal Business Activity" test.

In *National Spinning Company v. The City of Washington, North Carolina,* 312 F. Supp. 958 (E.D.N.C. 1970), the district court held that a plaintiff who was incorporated in the State of New York and whose corporate offices were in the State of New York, but whose manufacturing operation was in North Carolina, is as a conclusion of law a citizen of North Carolina. *Id.* at 962.

Likewise in *Riggs v. Island Creek Coal Company,* 387 F. Supp. 1363 (S.D. Ohio 1974), *rev'd on other grounds,* 542 F.2d 339 (6th Cir. 1975)[1] the district court held that a defendant whose incorporation was in Delaware, its principal place of business (corporate headquarters) was in Ohio, and the principal business activity "mining" which was in other states, was not a citizen of Ohio. "[A] mining corporation's principal place of business for bankruptcy proceedings was not necessarily where its principal executive offices were located". *Id.* at 1366, citing *Roszell Brothers v. Continental Coal Corp.,* 235 F. 343 (E.D. Ky. 1916). The district court further held that a coal mining company's principal place of business was in the district where the bulk of its coal mining and shipping operation was located, and nearly all of its coal lands were. *Id* at 1365.

The *Riggs* and *National Spinning* courts took a third approach to a corporation's citizenship. Previous examples of a corporation's citizenship included the state of the corporation

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1. The District Court did not find where the defendant Island Creek's principal place of business was, only that it was *not* Ohio, the residence of the plaintiff. The 6th Circuit stated that the District Court should have determined Island Creek's principal place of business, based on more detailed information, but went on to affirm the District Court's jurisdiction under an estoppel theory (542 F.2d at 342) before reversing the judgment on the merits of the case.

and the principal place of business which often included corporate headquarters. Now a third factor in determining a corporation's citizenship is espoused – the principal business activity – which specifically excludes, in certain instances, consideration of "corporate" (management) activity as the site of the principal place of business.

In *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556, (9th Cir. 1987), the plaintiff, Co-Efficient Corporation, was incorporated in Nevada in 1981 and maintained corporate offices in California. Since 1983, Co-Efficient's only business activity had been the prosecution of the underlying lawsuit. Co-Efficient brought suit in the district court in California based on diversity of citizenship. All of the defendants were citizens of California. The court held that Co-Efficient's principal place of business was California, thus destroying diversity jurisdiction. On appeal, Co-Efficient asserted that it was an inactive corporation which existed solely for the purpose of the underlying action. Co-Efficient's argument was that as an inactive corporation, it had no principal place of business and was only a citizen of the state of its incorporation. The Court of Appeals held that even though Co-Efficient did not engage in traditional business activities in California it nonetheless was not an inactive corporation. The Court felt that the underlying contract action made Co-Efficient a California institution engaged in business exclusively in California and "allowing this action to proceed in a federal court on the basis of diversity and jurisdiction by concluding that Co-Efficient is only a citizen of Nevada [state of incorporation] would defeat the congressional intent underlying the 1958 amendment to 28 U.S.C. §1332 (c)." (eliminating access to the federal courts to citizens of the same state) *Id.* at 559. Note, the opposite conclusion reached in the Sanders case discussed above.

3. Forum of Corporate Conclusion

Our *McNamee* case represents the third approach taken in analyzing these inanimate corporate cases. Here the Third Circuit now postulates that wind-up corporate activity in the form of litigation is as much a business activity as producing

goods or services for profit and gain. Thus they look not to the state of incorporation and/or place of last activity, but rather redefine current activity and give weight in determining the viability of a corporation whose current activities cut across the grain of standard notions of business purpose and profit. This is not inapposite to the holding in *Co-Efficient* which can also be placed in this category.

4. Conclusion with Respect to Consistency Among the Circuits.

The issue of corporate citizenship continues to plague the legal system and needs to be resolved. No clear line of Circuit court opinions has addressed the issue of an inactive corporate party which has as it's only remaining business the defense or pursuit of litigation. The cases that can be found are split as to the resolution of the corporation's citizenship. Based on these conflicting opinions, this issue should be decided by the United States Supreme Court.

CONCLUSION

The law of "doing business" is well developed for many aspects of jurisdiction, going back to influential cases such as *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945). However, this Court has never considered the circumstances of this case, where a corporation is no longer pursuing the primary business activity for which it was formed. Considering the wide variety of results in Federal district and circuit courts dealing with this type of situation, and further considering the number of cases in Federal Districts in Pennsylvania influenced by the Third Circuit's decision in this case, this Court should issue Writ of Certiorari under the policy of Supreme Court Rule 10.

Respectfully submitted,

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September 26, 1990.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McNAMEE and JOSEPHINE McNAMEE, h/w	:	CIVIL ACTION
vs.	:	
	:	NO. 88-9259
THE CELOTEX CORP., et al	:	

ORDER

AND NOW this 24th day of April 1989, upon consideration of the motion to dismiss of defendant, Southern Textile Corporation, it is hereby ORDERED that in accordance with F.R.C.P. 12(b)(1) the above case is hereby dismissed without prejudice there being no diversity of citizenhip between plaintiffs and all defendants. Parties to take depositions or other discovery to be presented to the court within 30 days. If no further action taken this matter will be dismissed with prejudice as to defendant Southern Textile Corp. only.

BY THE COURT:

J.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McNAMEE and JOSEPHINE McNAMEE, h/w	:	
	:	C.A. NO. 88-9259
vs.	:	
THE CELOTEX CORP., et al	:	

MEMORANDUM OPINION AND ORDER

WEINER, J. JULY 11, 1989

On December 5, 1988, plaintiffs, citizens of Pennsylvania, brought this action alleging injuries suffered by the husband-plaintiff from exposure to asbestos allegedly sold and supplied by the defendants. The sole basis for federal jurisdiction alleged in the complaint is diversity of citizenship. On April 10, 1989, defendant Southern Textile Corporation ("Southern") filed a motion to dismiss the action for lack of subject matter jurisdiction claiming that since Southern allegedly maintains its principal place of business in Pennsylvania, complete diversity is lacking between plaintiffs and all of the defendants. By Order dated April 24, 1989, we granted Southern's motion and dismissed the action without prejudice. In that same order, we also directed the parties to take depositions or conduct other discovery on the issue of Southern's principal place of business before we dismissed the action *with* prejudice. Pursuant to our Order, the plaintiffs took the deposition of David Howes ("Howes deposition") who identified himself at the deposition as an agent of Southern. In addition, Southern has attached to its opposition to plaintiffs' motion for reconsideration as Exhibit C, the affidavit of Howes ("Howes affidavit"). Based on this discovery, plaintiffs filed a motion for reconsideration of our Order of April 24, 1989. The court heard oral argument on this motion on July 7, 1989. For the reasons which follow, the motion is denied.

It is well-settled that diversity of citizenship between plaintiffs and defendants must be complete to confer jurisdiction under 28 U.S.C. §1332. *Strawbridge v. Curtis,* 7 U.S. (3 Cranch) 267 (1806); *Owen Equipment and Erection Co. v. Kroger,* 437 U.S. 365 (1978). Diversity of citizenship is determined as of the time of the filing of the complaint. 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure: Jurisdiction,* §3608, at 653 and n. 1. A corporation such as Southern is deemed a citizen not only of its state of incorporation but also of the state where it has its principal place of business. 28 U.S.C. §1332(c). This dual citizenship requirement was intended to restrict the availability of diversity jurisdiction in cases involving corporations, *Panalpina Weltransport GMBH v. Geosource, Inc.,* 764 F.2d 352, 354 (5th Cir. 1985), by denying federal court access to "essentially local corporations which were incorporated in outside states." *Hanna Mining Co. v. Minnesota Power and Light Co.,* 573 F.Supp. 1395, 1400 (D. Minn. 1983), *aff'd,* 739 F.2d 1368 (8th Cir. 1984).

In the case *sub judice,* it is undisputed that Southern is a citizen of Delaware, the state in which it was incorporated. It is also undisputed that Southern is a wholly-owned subsidiary of H. K. Porter Company, Inc. ("H. K. Porter"), a Pennsylvania corporation with its principal place of business in Pennsylvania. (Howes affidavit at ¶11, 12; Howes deposition at 12) It is further undisputed that the corporations were not formally merged; each retained its status as an incorporated entity. The question which remains in dispute and which we must determine is where does Southern, as a wholly-owned subsidiary of H. K. Porter, maintain its principal place of business. Plaintiffs argue that Southern's principal place of business is in Delaware or North Carolina, while Southern argues it is in Pennsylvania.

In *Bonar, Inc. v. Schottland,* 631 F.Supp. 990, 997 (E.D. Pa. 1986), this court aptly summarized the law regarding the principal place of business of a subsidiary as follows:

> While the general rule is to give jurisdictional effect to separate corporate entities, *see Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.,* 461 F.2d 1140,

1142 (3d Cir. 1972), in determining the principal place of business of a subsidiary, the subsidiary's relationship to the parent corporation is a factor which the court must consider. Where the corporate separation between the parent and subsidiary is "real" and carefully maintained and the subsidiary has a clearly discernible principal place of business which is different from that of the parent's, the subsidiary's separate place of business is recognized. *Id.* at 1142. Where, however, the corporate separation is "fictitious" or where the subsidiary's business is not distinguishable from the business of the parent and they are acting as one or are in fact one corporate entity, the parent's place of business is recognized as the principal place of business of the subsidiary. *See, eg., Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 557 (5th Cir. 1985); *Panalpina Welttransport GMBH v. Geosource, Inc.*, 764 F.2d 352, 354-55 (5th Cir. 1985); *United States v. Reserve Mining Co.*, 380 F.Supp. 11, 27 (D. Minn. 1974), *aff'd, Reserve Mining Co. V. EPA*, 514 F.2d 492 (8th Cir. 1975). See generally *Fritz v. American Home Shield Corp.*, 751 F.2d 1152, 1153 (11th Cir. 1985); *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315-16 (5th Cir. 1980); *Frazier, III v. Alabama Motor Club, Inc.*, 349 F.2d 456, 460 (5th Cir. 1965).

In the case *sub judice,* it is quite apparent from the Howes deposition and Howes affidavit, the contents of which, incidentally, have not been refuted by plaintiffs, that although H. K. Porter and Southern retain their own articles of incorporation, they have in actuality become fused for purposes of subject matter jurisdiction. Although at one time Southern maintained and had a "clearly discernible principal place of business" in Charlotte, North Carolina, Southern sold its textile manufacturing operations at that location some five and one half years prior to the institution of this lawsuit. (Howes affidavit at ¶4; Howes deposition at 12, 30). Indeed, Southern no longer owns any assets or property in North Carolina, (Howes deposition at 27), nor does it actively conduct any manufacturing operations (Howes affidavit at ¶5; Howes deposition at 18). As of the filing

of the compliant in this matter, the only business activity Southern was engaged in was the defense and prosecution of tens of thousands of asbestos lawsuits. (Howes affidavit at ¶6; Howes deposition at 29). However, corporate decisions regarding the prosecution, defense and settlement of this litigation are made by Southern's agents, officers and directors solely at H. K. Porter's offices in Pittsburgh, Pennsylvania. (Howes affidavit at ¶¶7, 18). In fact, each of Southern's current officers and directors is also an officer and director of H. K. Porter, and each is employed by Porter in Porter's Pittsburgh, Pennsylvania office (Howes affidavit at ¶13). Moreover, the meetings of Southern's officers, directors and shareholders occur at the offices of Porter in Pittsburgh, Pennsylvania (Howes affidavit at ¶14; Howes deposition at 32), and Southern's corporate books, records and minutes are located and maintained at the Porter offices in Pittsburgh, Pennsylvania (Howes affidavit at ¶15). In addition, service of process as to Southern is made and accepted at the Porter offices at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania (Howes affidavit at ¶17; Howes deposition at 29). Southern does not have an authorized agent for the acceptance of service of process in North Carolina or anywhere else (Howes affidavit at ¶17). Also noteworthy is the fact that Southern does not have an office within the Porter offices or anywhere else for that matter where the corporate name appears on the door (Howes deposition at ¶16). Southern does not own any real estate or personal property (Howes deposition at 16). It does not engage or pay any employee and does not rent or own any office furniture (Howes deposition at 17) . It even does not have a telephone number listed in Pennsylvania specifically under its corporate name (Howes deposition at 27-28). Finally, Southern has never applied for nor been issued a Certificate of Authority to operate as a foreign corporation in Pennsylvania (Exhibit F to plaintiff's motion for reconsideration).

In short, Southern is completely dominated by the officers, directors and agents of H. K. Porter, who may wear two hats, but who make all the business decisions for Southern at H. K. Porter's offices in Pittsburgh, Pennsylvania and who receive their salaries from one payroll. Under these circumstances, we

must conclude that Southern has become fused with H. K. Porter for purposes of subject matter jurisdiction. To conclude otherwise, would be to blindly exalt form over fact. Consequently, for purposes of diversity under a parent/subsidiary alter-ego analysis, Southern assumes the principal place of business of H. K. Porter (Pennsylvania), thus destroying diversity. Since Southern is by no means an indispensable party to this action, rather than dismiss this matter outright, we will transfer the complaint only as to defendant Southern to the State Court or the United States District Court for the District of New Jersey, at the option of the plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McNAMEE AND JOSEPHINE McNAMEE, H/W	:	
	:	
vs.	:	C.A. NO. 88-9259
	:	
THE CELOTEX CORP., ET AL	:	

ORDER

The motion of the defendant Southern Textile Corporation for reconsideration is DENIED.

The Order of this court dated April 24, 1989 is, however, VACATED.

In its stead it is ORDERED that the complaint is TRANSFERRED only as to defendant Southern Textile Corporation to the State Court or the United States District Court for the District of New Jersey, at the option of the plaintiffs. Plaintiffs are to advise the court within ten (10) days in which forum they wish to proceed as to defendant Southern Textile corporation.

The complaint shall remain in this district as to all other defendants.

IT IS SO ORDERED.

Charles R Weiner

CHARLES R. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McNAMEE AND JOSEPHINE McNAMEE, H/W	:	
vs.	:	C.A. NO. 88-9259
THE CELOTEX CORP., ET AL	:	

ORDER

WEINER, J. JULY 19, 1989

Pursuant to David M. Weinfeld's letter to the court dated July 17, 1989, the above-captioned matter is transferred only as to defendant Southern Textile Corporation to the United States District Court for the District of New Jersey. The matter shall remain in this district as to all other defendants.

IT IS SO ORDERED.

Charles R Weiner.

CHARLES R. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

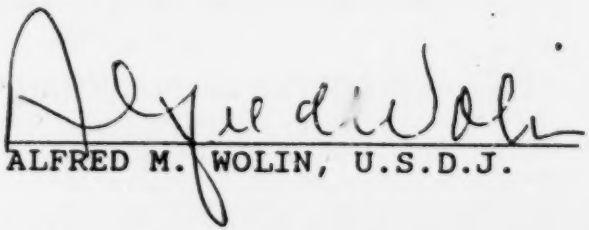
PATRICK J. McNAMEE AND PATRICK McNAMEE, et al.,	:	
vs.	:	Civil Action No. 89-3600
SOUTHERN TEXTILE CORPORATION	:	
Defendant	:	

ORDER

This matter being opened to the Court on the motion of the defendant, Southern Textile Corporation and the parties having agreed that the application be considered in accord with Fed. R. Civ. P. 78; and it further appearing to the Court that the parties to this litigation are non-diverse as determined by a Memorandum Opinion and Order entered on July 11, 1989 by the Honorable Charles J. Weiner, Judge of the United States District Court for the Eastern District of Pennsylvania; and it further appearing that jurisdiction is asserted pursuant to 28 U.S.C. §1332,

It is on this 26th day of December, 1989

ORDERED that the complaint as to the defendant Southern Textile Corporation be and is hereby dismissed for lack of subject matter jurisdiction due to the non-diverse status of plaintiffs and defendant, Southern Textile Corporation, each being residents of the State of Pennsylvania as of the time of filing complaint.



ALFRED M. WOLIN, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5043

PATRICK J. McNAMEE AND
JOSEPHINE McNAMEE, his wife,

Petitioners

v.

THE CELOTEX CORPORATION;
EAGLE PICHER INDUSTRIES INC.;
FIBREBOARD CORPORATION;
FLEXITALLIC GASKET COMPANY;
GAF CORPORATION; HOPEMAN BROTHERS INC.;
NATIONAL GYPSUM COMPANY;
OWENS-CORNING FIBERGLASS COMPANY;
OWENS-ILLINOIS GLASS COMPANY;
RAYMARK INDUSTRIES INC.;
SOUTHERN TEXTILE CORPORATION;
TURNER & NEWALL LTD;
FORTY EIGHT INSULATIONS INC.;
UNITED STATES GYPSUM COMPANY

On Appeal from the United States District Court for
the District of New Jersey
(D.C. No. 89-03600)
District Judge: Hon. Alfred M. Wolin

Submitted under Third Circuit Rule 12(6)
June 25, 1990

Before: SLOVITER and MANSMANN, *Circuit Judges*
and Fullam, *District Judge**
(Filed: June 28 1990)

* Hon. John P. Fullam, United States Senior District Judge for the Eastern District of Pennsylvania sitting by designation.

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Circuit Judge*

This is an appeal by plaintiffs Patrick and Josephine McNamee from the district court's order dismissing their complaint against defendant Southern Textile Corporation (southern) for lack of subject matter jurisdiction on the ground that Southern's principal place of business is in Pennsylvania, thereby destroying diversity between it and the plaintiffs.

I.

Plaintiffs filed this suit against Southern and other defendants on December 5, 1988 alleging asbestos-related injuries to Patrick McNamee. Plaintiffs alleged that they were both citizens and residents of the Commonwealth of Pennsylvania. Southern filed a motion to dismiss, supported by affidavits, alleging that it was incorporated in Delaware, that its principal place of business was Pittsburgh, Pennsylvania, not Charlotte, North Carolina, as plaintiffs claim, and that there was no diversity between it and the plaintiffs. The district court for the Eastern District of Pennsylvania dismissed without prejudice and directed the parties to conduct discovery on the issue of Southern's principal place of business before the action was dismissed with prejudice.[1] The plaintiffs took the deposition of David Howes, an agent of Southern, one of the affiants, which they attached to their motion for reconsideration.

In his deposition, Howes stated that Southern was formerly Southern Asbestos, which came into existence in 1974 as a wholly owned subsidiary of H.K. Porter Co. In 1979, its name was changed to Southern Textile Corporation and its principal occupation was manufacturing textile products in Charlotte, N.C. in a plant that Porter had transferred to Southern at its inception. Southern ceased all manufacturing and sales in 1983

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1. This was problematic. Dismissal for lack of subject matter jurisdiction is always without prejudice to the merits of the underlying claim. *See Verret v. Elliot Equipment Corp.*, 734 F.2d 235, 238 (5th Cir. 1984); *see generally*, 13 C. Wright, A. Miller, E. Cooper, Federal Practice & Procedure §3522 (2d ed. 1982).

when its physical assets were sold. As of 1988, Southern's assets consisted of cash and insurance coverage and its business was defending asbestos suits. Its top officers were also officers of Porter, and it worked out of their offices in Pittsburgh. It purchased the services of attorneys and accountants, but owned no furniture. Howes, who organized the defense of asbestos suits and was an agent of Southern, was paid by Porter and his work for Southern was part of his job duties as an employee of Porter.

The district court, after oral argument, denied the motion for reconsideration. In its opinion, it stated that Porter and Southern had become merged for purposes of subject matter jurisdiction; Southern is completely dominated by the officers, directors and agents of Porter, who make all the business decisions for Southern at Porter's offices in Pittsburgh, Pennsylvania. It thus reaffirmed its determination that Southern was to be treated as having its principal place of business in Pennsylvania. Rather than dismiss the action as to Southern, however, the district court gave the plaintiffs the option of having the complaint transferred to state court or to the United States District Court for the District of New Jersey. The plaintiffs presumably chose to have it transferred to the district of New Jersey because on December 12, 1989, the District Court for the District of New Jersey dismissed the action for lack of diversity jurisdiction pursuant to the determination by the court transferring the action that the parties were not diverse. Plaintiffs appeal.[2]

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2. While this case was under consideration, plaintiffs sought to file with this court additional documents purportedly showing Southern's continued presence in North Carolina Via an agent for service. Evidence not presented to the district court is not part of the record on appeal, and we are not free to consider it. See Fed. R. App. P. 10(a). We intimate no view on whether it would be appropriate for plaintiffs to file a Rule 60(b) motion with the district court, nor whether, even if accepted, such evidence would signify that Southern's principal place of business is also in North Carolina.

II.

We face initially a question as to our jurisdiction. Southern argues that the notice of appeal was untimely. It argues that once the district court decided that it lacked subject matter jurisdiction, plaintiffs should have appealed the order transferring the complaint within thirty days. Defendants' contention is that the transfer order of the Pennsylvania district was a nullity. We agree with defendant that once the district court held there was no federal subject matter jurisdiction, the decision to transfer the case as to Southern to the federal district court in New Jersey, where the same subject matter jurisdiction principles govern, was plainly erroneous. That does not render the order a nullity. Plaintiffs might have sought mandamus but they could not have appealed because a transfer order is interlocutory, not final. See *McCreary Tire & Rubber Co. v. Ceat*, 501 F.2d 1032, 1034 (3d Cir. 1974) (transfer order pursuant to 28 U.S.C. §1404(a) is interlocutory and unappealable under section 1291, although limited review may be available under mandamus or through discretionary appeal under section 1291(b)). Plaintiffs adhered to the statutory mandate that courts of appeals have jurisdiction of appeals from final decisions of district courts. The notice of appeal was filed within 30 days of the final order dismissing the action and is timely. We have jurisdiction pursuant to 28 U.S.C. §1291 and thus address the merits of the appeal.

III.

Plaintiffs argue on appeal that Southern has been inactive since it ceased its manufacturing operations in North Carolina, and that an inactive corporation has no principal place of business or, in the alternative, its principal place of business is the state where it last conducted significant business. They challenge the district court's holding that the subsidiary, Southern, is so intertwined with its.parent, Porter, that it should be treated for subject matter jurisdiction purposes as having the same principal place of business. Although findings of fact about a corporation are reviewed under a clearly erroneous standard,

the decision of what facts are significant and determinative in deciding a corporation's principal place of business is a legal question and "one for a court to decide as a question of law." *Kelly v. United States Steel Corp.*, 284 F.2d 850, 852 (3d Cir. 1960).

If plaintiff's allegations of jurisdiction are challenged by a defendant, the plaintiff bears the burden of proof. *Thompson v. Gaskill*, 315 U.S. 442 (1942). Plaintiffs argue that Southern is an inactive corporation, but they have not presented any evidence in support. This case is therefore distinguishable from *Gavin v. Read Corp.*, 356 F. Supp. 483 (E.D. Pa. 1973), *aff'd without opinion*, 523 F. 2d 1050 (3d Cir. 1975), where there was evidence that the corporation had sold all its assets, was in process of liquidating, had no offices or sales or purchases, and had only one agent to receive complaints.

Plaintiffs point to a pleading filed by Southern in 1984 in a state court action where Southern alleged it does not do business in Pennsylvania. Diversity must be present at the time the complaint is filed. See *Gilbert v. David*, 235 U.S. 561, 569 (1914); Kelly, 283 F.2d at 99 n.1; *Mas v Perry*, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974). Thus, pleadings filed in state court in 1984 are inapposite to this determination. Moreover, the Pennsylvania statutes on the conduct of business by foreign corporations to which plaintiffs refer do not bear on this determination, because the determination is controlled by federal law, not state law. *Mas*, 489 F.2d at 1399.

There is no single test for determining a corporation's principal place of business. *Ouaker State Dyeing & Finish Co. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1143 (3d Cir. 1972). The district court determined that Southern was completely dominated by its parent, Porter, and that its principal place of business was that of Porter. Op. at 6. A subsidiary maintains a separate place of business where the corporate separation between the two is real and carefully maintained. *Ouaker State*, 461 F.2d 1142 (citing *Lurie Co. v. Loews San Francisco Hotel Corp.*, 315 F. Supp. 405, 410 (N.S. Ca. 1970)). In *Ouaker State*, we held that the parent and subsidiary were separate entities

with separate principal places of business because corporate books were separately kept and transactions between the two were represented by appropriate book entries. *Id.*

We need not reach the domination issue in this case. Southern's unrebutted affidavits show it to be an active corporation involved in the prosecution and defense of numerous asbestos-related lawsuits. Howes testified that Southern conducts defense litigation and that he makes decisions concerning Southern's corporate policies. All its affairs are conducted from Pennsylvania. *See Kelly,* 284 F.2d at 854. Pennsylvania is where its business activities are centered, and, thus, is its principal place of business. *See id.; Quaker State,* 461 F.2d at 1143 (most significant factor is headquarters of day to day corporate activities; also look to where board decisions concerning overall corporate functions are reached and where a number of the basic corporate functions are maintained).

In light of this record, there is no reason to hold, as plaintiffs would have us do, that Southern has no principal place of business or that its principal place of business remains in North Carolina where it has long since severed ties.

IV.

For the reasons stated above, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing opinion.

Dolores K. Sloviter

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5043

PATRICK J. McNAMEE and JOSEPHINE McNAMEE, h/w,
Petitioners

v.

THE CELOTEX CORPORATION, et al.

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge,* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, *Circuit Judges,* and FULLAM, *District Judge**

The petition for rehearing filed by Petitioners Patrick J. McNamee and Josephine McNamee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dk Sloviter

Circuit Judge

Dated: July 30, 1990

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* Hon. John P. Fullam, United States Senior District Judge for the Eastern District of Pennsylvania as to panel rehearing only.

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF ALLEGHENY :

Michael Mocniak, being duly sworn according to law, deposes and says:

1. I am an Agent for Southern Textile Corporation (hereinafter "Southern Textile"), a position that I have held for three (3) years.

2. I make this affidavit from personal knowledge, based upon my familiarity with the corporate structure and operations of Southern Textile.

3. Southern Textile is incorporated under the laws of the State of Delaware. However, it conducts no business in Delaware, and maintains no office or other operations there.

4. Until February of 1983, Southern Textile maintained its headquarters and principal place of business at 1000 Seaboard Street, Charlotte, North Carolina, at which time its manufacturing operations at that location were sold.

5. Currrently, Southern Textile does not actively conduct any manufacturing operations.

6. Corporate records are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania. Business meetings of the corporation are conducted there and service of process is made and accepted there.

7. Accordingly, as of the date of the filing of the Complaint in the instant action, the principal place of business of Southern Textile was Pittsburgh, Pennsylvania.

Michael Mocniak

Date:

Sworn to and subscribed
before me this 3rd
day of October, 1985.

Notary Public
My Commission Expires:

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF ALLEGHENY :

David A. Howes, being duly sworn according to law, deposes and says:

1. I am an Agent for Southern Textile Corporation (hereinafter "Southern Textile"), and am authorized to make this affidavit.

2. I make this affidavit from personal knowledge, based upon my familiarity with the corporate structure and operations of Southern Textile.

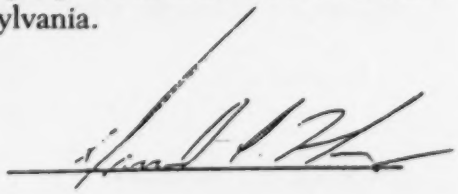
3. Southern Textile is incorporated under the laws of the State of Delaware. However, it conducts no business in Delaware, and maintains no office or other operations there.

4. Until February of 1983, Southern Textile maintained its headquarters and principal place of business at 1000 Seaboard Street, Charlotte, North Carolina, at which time its manufacturing operations at that location were sold.

5. Currently, Southern Textile does not actively conduct any manufacturing operations.

6. Corporate records are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania. Business meetings of the corporation are conducted there and service of process is made and accepted there.

7. Accordingly as of the date of the filing of the Complaint in the instant action, the principal place of business of Southern Textile was Pittsburgh, Pennsylvania.



Date: March 28, 1989

Sworn to and subscribed
before me this 28th
day of March, 1989.

Sandra D. Ferguson
Notary Public
My Commission Expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. McNAMEE and JOSEPHINE McNAMEE, h/w	:	CIVIL ACTION
Plaintiffs	:	
vs.	:	
	:	
THE CELOTEX CORP., et al	:	
Defendants	:	NO. 88-9259

Oral Deposition of DAVID A. HOWES, taken pursuant to notice, at the office of White and Williams, 1234 Market Street, Philadelphia, Pennsylvania, on Tuesday, May 23, 1989, beginning at approximately 11:17 a.m., before Wanda M. Barnum, Registered Professional Reporter-Notary Public, there being present.

APPEARANCES:

DAVID M. WEINFELD, ESQUIRE
Suite 301
Jenkintown Plaza
101 Greenwood Plaza
Jenkintown, Pennsylvania 19046
Phone: (215) 561-4441
Representing the Plaintiffs

DAVID A. HOWES

A. Yes, sir.

Q. If you would please — because there is a court stenographer here, please make your responses to questions verbal as unfortunately we cannot make a record of shakes of the head or hand gestures or things of that type.

First of all, can you give us your full name and business address?

A. David A. Howes, H-O-W-E-S. Business address is H.K. Porter Company, Inc., 601 Grant Street, Pittsburgh, Pennsylvania.

Q. And your age?

A. Thirty-six.

Q. Your date of birth?

A. April 28, 1953.

Q. Are you currently employed?

A. Yes.

Q. Whom are you employed by?

A. H.K. Porter Company, Inc.

Q. How long have you been employed by that entity?

A. Since December of 1987.

Q. And in what capacity are you employed by them?

A. Assistant counsel.

MR. LEVY: Then ask him how Southern Textile was created.

MR. WEINFELD: And then I'm going to go backwards. If you want me to go backwards, counsel, we're going to get back to H.K. Porter. And if you tell him not to answer the question at that point, then I'll call the judge and I'll ask him to tell us whether we can ask the question. And we'll take the time and do it because I want to get to Southern Textile. But Southern Textile doesn't come into being except for, we believe, H.K. Porter. And we've got to establish H.K. Porter's connection with Southern Asbestos in the first instance.

MR. LEVY: No, you don't.

MR. WEINFELD: You don't think so? Fine. Are you going to still instruct him not to answer the question?

MR. LEVY: Yes.

BY MR. WEINFELD:

Q. When did Southern Asbestos Company come in to existence?

A. 1974.

Q. And how did it come in to existence?

A. It was formed as a wholly owned subsidiary of H.K. Porter Company.

Q. Is it still a wholly owned subsidiary of H.K. Porter Company?

A. Yes.

Q. Other than the H.K. Porter Company, does any other person, partnership or business entity own any stock in Southern Textile Corporation?

A. No.

Q. Now, did the name Southern Asbestos Company ever change?

A. Yes.

Q. When?

A. I believe it was January 12, 1979. The name was changed to Southern Textile Corporation.

Q. And what did the Southern Textile Corporation do in 1979?

A. Essentially it manufactured textile products.

Q. Where was the manufacturing production facility in 1979?

A. Charlotte, North Carolina.

Q. Did Southern Textile Corporation build that plant?

A. No, I don't believe so.

Q. Was that plant in existence in January of 1979?

A. It was my understanding that it was, yes.

Q. Do you know how it was that Southern Textile Corporation either owned or got the use of that Charlotte, North Carolina plant?

A. It is my understanding that when Southern Asbestos Company was created as a wholly owned subsidiary of H.K. Porter, that the plant was transferred to Southern Asbestos Company at that time.

Q. From?

A. H.K. Porter.

Q. And when did H.K. Porter first get ownership of that plant in Charlotte, North Carolina?

MR. LEVY: Objection.

You can answer that, if you know.

THE WITNESS: I believe that it would have occurred some time about 1958 or 1959 when H.K. Porter Company and Thermoid Company was merged.

BY MR. WEINFELD:

Q. Thermoid?

MR. LEVY: You want to spell that for the court reporter?

THE WITNESS: T-H-E-R-M-O-I-D.

BY MR. WEINFELD:

Q. Besides the manufacturing facility in Charlotte, North Carolina, did Southern Textile Corporation or its predecessor in name, Southern Asbestos Company, manufacture any other products of any kind other than from the Charlotte, North Carolina plant?

A. Yes. There was an additional plant I believe in Bennettsville for a period of time.

Q. Bennettsville? What state was Bennettsville in?

A. I think that's North Carolina.

Q. Were there any other production facilities at either Southern Asbestos Company or Southern Textile Corporation utilized to manufacture any products?

A. I don't believe so.

Q. Is the Southern Textile Corporation still in existence?

A. Yes.

Q. In what state was it originally incorporated?

A. Delaware.

Q. Is it still an incorporated citizen of Delaware?

A. Yes.

Q. Has it ever changed its state of incorporation?

A. Not to my knowledge.

Q. At any time has Southern Textile Corporation filed any papers of dissolution with the State of Delaware?

A. I don't believe so.

Q. At any time has the Southern Textile Corporation filed papers of dissolution with any other state in the United States?

A. It was only incorporated in Delaware as far as I know, so there would be no occasion to file any other papers that I know of.

Q. Okay.

Does the Southern Textile Corporation have any assets as we sit here today?

A. Yes.

Q. Could you tell us what those assets are?

A. It has some cash. Probably depends on how you want to define assets. If you're defining insurance coverage assets, then we may have some insurance coverage.

Q. Anything other that insurance coverage or cash, any sort of real estate?

A. I don't believe so.

Q. So it owns no real estate of any kind that you're aware of?

A. Not that I'm aware of.

Q. Does the Southern Textile Corporation own any personal property of any kind?

A. Not that I can think of offhand, no.

Q. Does the Southern Textile Corporation have an office?

A. What do you mean by have an office? It would be Pittsburgh. It would the Grant Street – 601 Grant Street, Pittsburgh.

Q. Is there a room that has a door with the name Southern Textile Corporation listed on it?

A. No.

Q. And so I'm clear, because I want to be clear in my questions, there is no separate office with the name Southern Textile Corporation on it?

A. No.

Q. Is it also true that the H.K. Porter Company, Incorporated is headquartered at 601 Grant Street?

A. Yes.

Q. And they are the owners of all the stock of Southern Textile Corporation?

A. That's correct.

Q. Besides the Pittsburgh, Pennsylvania address which you gave us, does the Southern Textile Corporation have an office anywhere else in the United States?

A. No.

Q. Does the Southern Textile Corporation pay rent for the use of any office or conference room space at the Pittsburgh, Pennsylvania address?

A. No.

Q. Does the Southern Textile Corporation have any employees?

A. No.

Q. Does the Southern Textile Corporation rent or own in its own right any office equipment of any kind?

A. Not that I'm aware of.

Q. Does it own or rent any furniture?

A. Isn't that the same question? Not that I'm aware of.

Q. Does the Southern Textile Corporation currently engage in the sale of any product or service?

A. No.

Q. Does the Southern Textile Corporation purchase any products or services for its own use?

A. I suppose it depends on how you define services.

Q. If you feel there are some services that it purchases, I would certainly be open to hear what you believe it is they purchase.

A. Certainly they have to engage in attorneys on their behalf.

Q. Other than engaging in attorneys for litigation, does it purchase any goods or services that you're aware of?

A. Accounting services and audit services must be provided.

Q. Anything else that you can think of besides legal accounting?

A. No. Most everything would be connected to those areas.

Q. Does the corporation at this point in time – and I don't mean to be repetitive. I'm not sure that I've asked the question before.

Does the corporation at this time engage in the manufacture or production of any goods of any kind?

A. No.

Q. Does it engage in the sale of services of any kind?

A. No.

MR. LEVY: I'm sorry. Was that question sale of services?

MR. WEINFELD: Yes.

BY MR. WEINFELD:

Q. At any time has Southern Textile Corporation filed with the Commonwealth of Pennsylvania a certificate to operate as a foreign corporation?

A. I don't know.

Q. Would there be someone who would know that?

A. Probably the Commonwealth of Pennsylvania.

Q. Other than the Commonwealth of Pennsylvania, would there be any agent or officer or someone connected with the Southern Textile Corporation who would know that?

A. Not without going to look it up in corporate records the same way I would go and look it up in corporate records.

Q. Is there a custodian of the Southern Textile Corporation corporate records?

A. Yes.

Q. Who would that person or persons be?

A. Me.

Q. Are those records readily accessible to you?

A. They are in Pittsburgh, yes.

A. You mean like a written contract, sales contract?

Q. Yes, sir, a written contract of any kind.

A. Other than to obtain the services previously mentioned of attorneys or accountant type personnel, I don't believe so.

Q. Does Southern Textile Corporation own any assets or have any property that still resides or exists in Charlotte, North Carolina?

A. Not as far as I know.

Q. What happened to those assets?

A. They were sold.

Q. Do you know who they were sold to?

A. I don't know the exact name of the company, but I believe it was Southern Industrial Products Company or something like that.

Q. Is Southern Industrial Products Company in any way connected with or owned by H.K. Porter?

A. Not to my knowledge.

Q. Does Southern Textile Corporation have a listed telephone number in Pennsylvania?

A. I don't know to tell you the truth. I mean –

Q. Are you familiar with a number that's designated as the phone number for Southern Textile Company, Incorporated.

Q. Does H.K. Porter then act as the agent of Southern for acceptance of service and to act as its authorized designated agent?

A. Yes.

Q. Does Southern Textile Corporation do business in the Commonwealth of Pennsylvania? I should say conduct business.

MR. LEVY: Define what you mean by that.

BY MR. WEINFELD:

Q. Does it engage in any activities other than the storage and retention of records?

A. Yes.

Q. What kind of business does it engage in?

A. Defends all of the asbestos personal injury litigation.

Q. Okay. Fair enough.

Other than defending litigation for asbestos personal injury, does it engage in any other business?

A. At this time, no.

Q. When did it last engage in business other than defense of personal – asbestos personal injury litigation?

A. I believe at the time the assets were sold in 1983.

Q. And that's when they were sold to this other company?

A. Yes.

Q. This would be the assets in Charlotte, North Carolina?

A. Yes.

Q. Once the assets were sold in Charlotte, North Carolina, except for defending asbestos personal injury litigation, did Southern Textile Corporation cease to engage in business?

MR. LEVY: Objection.

THE WITNESS: Prior to my –

MR. LEVY: Define business.

BY MR. WEINFELD:

Q. Other than defending asbestos personal injury litigation post 1983, did Southern Asbestos Textile involve itself in any activity for pecuniary gain?

A. Prior to my becoming employed at H.K. Porter I don't know. Since that time the primary activities have been to be concerned with the defense of the asbestos personal injury litigation in whatever related functions are necessary.

A-28

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
HARRISBURG, PENNSYLVANIA
17120

May 31, 1989

OFFICE OF THE
SECRETARY OF THE COMMONWEALTH
717-787-7630

BUREAU OF CORPORATIONS
Area Code-717
Corporate Information - 787-1057
Name Availability - 787-1057
Review Unit - 787-6271
U.C.C. Section - 787-8712

Dolores M. Troiani
Law Office of David M. Weinfeld
Suite 301 Jenkintown Plaza
101 Greenwood Ave.
Jenkintown, Pa. 19046

RE: SOUTHERN TEXTILE CORPORATION

✓ 1. No listing of a Corporation, either foreign or domestic, or a registration under the provisions of the Fictitious Names Act, or a Limited Partnership bearing the name(s) of the above.
____ 2. Fee for Reservation of Name is $10.00 per name.
____ 3. Fee for Availability of Name is $5.00 per 3 names.
____ 4. Fee for Record Search or Officers is $5.00 per corporate name.
____ 5. Officers are not available due to: corporation out of existence, or it is an old corporation that is no longer of record.
____ 6. Name(s) available.
____ 7. Name not available due to conflict.
CONFLICT:
____ 8. Other:

Very truly yours,

Charles A. Ottaviano, Director
Corporation Bureau

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF ALLEGHENY :

David A. Howes, being duly sworn according to law, deposes and says:

1. I am an agent for Southern Textile Corporation (hereinafter "Southern Textile") and am authorized to make this affidavit.

2. I make this affidavit from personal knowledge and my review of corporate documents and records based upon my familiarity with the corporate structure and operations at Southern Textile.

3. Southern Textile is incorporated under the laws of the State of Delaware. However, it conducts no business in Delaware, and maintains no office or other operations there.

4. Until February of 1983, Southern Textile maintained its headquarters and principal place of business at 1000 Seaboard Street, Charlotte, North Carolina, at which time its manufacturing operations at that location were sold.

5. Currently, Southern Textile does not actively conduct any manufacturing operations.

6. As of the date of the filing of the complaint in the instant action, the main business activity of Southern Textile was the administration and management of litigation consisting of tens of thousands of cases.

7. Corporate decisions regarding the prosecution, defense and settlement of this litigation are made by Southern Textiles' agents, officers and directors solely in Pittsburgh, Pennsylvania on an on-going, daily basis. Specifically, all decisions regarding the retention of counsel as well as all decisions regarding the obtaining and retention of insurance coverage and the issuance and receipt of disbursements regarding said litigation occurs in Pittsburgh, Pennsylvania.

8. The agents, officers and directors of Southern Textile are all residents of Pennsylvania.

9. Southern Textiles' assets presently consist of insurance coverage and bank accounts. Said insurance contracts were

entered into by Southern in Pennsylvania and said bank accounts are maintained by Southern in Pennsylvania.

10. Southern Textile has not formally terminated its operations, has not engaged in "winding up" procedures, nor has it executed an agreement of dissolution and liquidation.

11. At all relevant times, Southern Textile has been a wholly-owned subsidiary of H. K. Porter Company, Inc.

12. The principal place of business of H. K. Porter Company, Inc. (hereinafter "Porter") is Pennsylvania.

13. Each of Southerns' current officers and directors is also an officer and director of H. K. Porter Company, Inc., and each is employed by Porter in Porter's Pittsburgh, Pennsylvania office.

14. Southern Textiles' officers', directors' and shareholders' meetings are held at the offices of Porter in Pittsburgh, Pennsylvania.

15. Corporate books, records and minutes for Southern Textile are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania at the Porter offices.

16. The business meetings of Southern Textile are conducted in Porter offices in Pittsburgh, Pennsylvania.

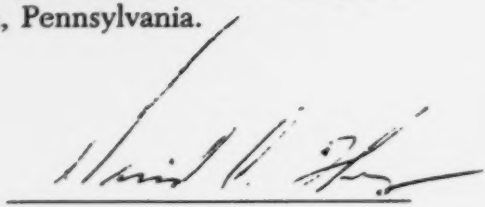
17. Service of process as to Southern Textile is made and accepted at the Porter offices at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania and there is no authorized agent for the acceptance of service of process in the state of North Carolina, or anywhere else, as to Southern Textile.

18. All of Southern Textiles' corporate decisions and business activities occur in the offices of Porter in Pittsburgh, Pennsylvania.

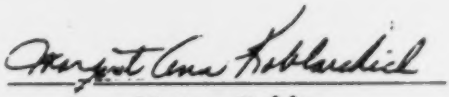
19. Southern Textile's 1988 tax return indicates the nature of its business as "Textile Products".

20. Accordingly, as of the date of this filing of the Complaint in the instant action, the principal place of business of Southern Textile was Pittsburgh, Pennsylvania.

DATE: June 23, 1989



Sworn to and subscribed
before me this 23rd
day of June 1989.



Notary Public
My Commission Expires:

No. 90-522

In The

Supreme Court of the United States

October Term, 1990

PATRICK J. McNAMEE AND JOSEPHINE McNAMEE, H/W

Petitioners,

v.

SOUTHERN TEXTILE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*VINCENT D. DUKE
I. STEVEN LEVY
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* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Third Circuit correctly determined that Southern Textile Corporation's ("Southern") principal place of business is in Pennsylvania for purposes of subject matter jurisdiction where, as of the date petitioners' complaint was filed, all of Southern's business activity took place in Pennsylvania and Southern was a wholly-owned and controlled subsidiary of H.K. Porter Company, Inc., whose principal place of business was itself in Pennsylvania.

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COUNTERSTATEMENT OF THE CASE

On December 5, 1988, petitioners, citizens of Pennsylvania, filed the instant diversity action against Southern Textile Corporation ("Southern") and others for injuries allegedly sustained as a result of occupational exposure to asbestos.[1] The instant petition arises out of the United States Court of Appeals for the Third Circuit's determination that Southern's principal place of business is in Pennsylvania, thereby making it a citizen of that state for purposes of federal subject matter jurisdiction.

In addition to the facts set forth by petitioners, the affidavits of Southern's agents, Michael Mochniak and David Howes, reproduced in petitioners' appendix at A-17 and A-18, indicate that Southern's corporate records are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania. The affidavits further indicate that Southern's business meetings are conducted at that location and that service of process is made and accepted there.

Furthermore, as is demonstrated by the deposition and June 23, 1989 declaration of David Howes, Southern has been and continues to be an active corporation which since 1983 has been involved in the prosecution and defense of tens of thousands of asbestos-related lawsuits[2]. Corporate decisions regarding the prosecution,

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[1] Southern's parent company is H.K. Porter Company, Inc. Southern has no subsidiaries.

[2] Selected portions of Mr. Howes' deposition are reproduced in petitioners' appendix at A-19 - A-27. Mr.

(Continued on following page)

defense and settlement of said litigation are made by Southern's duly designated officers and directors solely in Pittsburgh, Pennsylvania on an on-going daily basis. Similarly, decisions regarding the issuance and receipt of disbursements regarding said litigation are made in Pittsburgh, Pennsylvania. All decisions regarding the retention of counsel as well as decisions regarding the acquisition and retention of insurance coverage are made by the officers and directors of Southern in Pittsburgh, Pennsylvania (A-29 - A-30). Moreover, the officers and directors of Southern are all residents of Pennsylvania (A-29). Southern has not formally terminated its operations, is not engaged in "winding up" procedures, nor has it executed an agreement of dissolution and liquidation (A-22 and A-30). Southern's assets presently consist of insurance coverage and bank accounts. Said insurance contracts were entered into by Southern in Pennsylvania and said bank accounts are maintained by Southern in Pennsylvania (A-29 and A-30). Moreover, petitioners have not and cannot present this court with any evidence that Southern has permanently abandoned manufacturing or the textile industry. In fact, Southern's 1988 tax return indicates the nature of Southern's business as "Textile Products" (A-30).

Furthermore, at all relevant times herein, it is undisputed that Southern has been a wholly owned subsidiary of H.K. Porter Company, Inc. ("Porter") whose principal place of business is in Pennsylvania (A-20, A-21 and

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(Continued from previous page)

Howes' June 23, 1989 declaration is reproduced in petitioners' appendix at A-29 - A-31. As used throughout this brief, "A-___" refers to petitioners' appendix.

A-30). Each of Southern's current officers and directors is also an officer and director of Porter and each is employed by Porter in Porter's Pittsburgh, Pennsylvania office. Southern's officers', directors' and shareholders' meetings are held at the offices of Porter in Pittsburgh, Pennsylvania. Corporate books, records and minutes for Southern are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania at the Porter offices. The business meetings of Southern are conducted in Porter's offices in Pittsburgh, Pennsylvania. Service of process as to Southern is made and accepted at the Porter offices at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania and there is no authorized agent for the acceptance of service of process in the state of North Carolina or anywhere else. Southern sold its textile manufacturing facilities in North Carolina in 1983, five and a half years prior to the filing of petitioners' complaint (A-29 - A-31). Southern owns no assets or property in North Carolina (A-25) nor does it actively conduct manufacturing operations there (A-24 and A-29). All of Southern's corporate decisions and business activities occur at the offices of Porter in Pittsburgh, Pennsylvania (A-30).

The district court's holding that Southern is a citizen of Pennsylvania for purposes of diversity was based in part upon its finding that, as of the date petitioners' complaint was filed, Southern was a wholly owned and controlled subsidiary of H.K. Porter Company, Inc., whose principal place of business was indisputably in Pennsylvania (A-2 - A-6).

The Third Circuit's affirmance of the district court's decision was based upon its finding that Southern was an

active corporation involved in the prosecution and defense of numerous asbestos-related lawsuits, that all of Southern's affairs are conducted from Pennsylvania, and that all of Southern's business activities are centered in Pennsylvania (A-10 - A-15).

REASONS FOR DENYING THE PETITION

The Third Circuit properly relied upon other appellate court decisions in affirming the district court's decision regarding Southern's citizenship for purposes of federal subject matter jurisdiction. Moreover, the Third Circuit's decision, which affirmed the dismissal of petitioners' complaint, furthers the policy behind 28 U.S.C. Section 1332(c) of limiting the availability of diversity jurisdiction. The Third Circuit's decision is not inconsistent with the district and appellate court decisions cited by petitioners. Indeed, all cases cited by petitioners stand for the same proposition: a corporation's principal place of business for purposes of subject matter jurisdiction will be in that state where its presence is strongest. Furthermore, the issue of whether the court below adopted an inconsistent "test" in determining Southern's principal place of business is moot since Southern is the wholly owned and controlled subsidiary of H.K. Porter Co. Inc., whose principal place of business is in Pennsylvania.

A. The Third Circuit properly determined Southern's citizenship for purposes of diversity pursuant to federal law.

"Determination of one's State of citizenship for diversity purposes is controlled by federal law, not by the law

of any State." *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974), *reh'g denied*, 492 F.2d 1242 (1974), *cert. denied*, 419 U.S. 842 (1974); *Lincoln Associates v. Great American Mortg. Investors*, 415 F. Supp. 351, 353 (M.D. Tex. 1976) (determination of defendant's citizenship for diversity purposes is "strictly a matter of federal law"); 1 J. Moore, *Moore's Federal Practice* Para. 0.74[1] at 707.1 (1972).

Indeed, since the issue of a court's subject matter jurisdiction based on diversity of citizenship can only arise in federal court, federal common law, rather than state law, must determine the issue. As the court stated in *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968):

> The question of domicile can arise, in regard to the diversity clause of Article III, Section II of the Federal Constitution and under 28 U.S.C. Section 1332, only in federal court. The problem is, therefore, one uniquely of federal cognizance and the considerations underlying *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), do not obtain.

Thus, even in the event of a conflict between federal and state law, federal law must control the issue of citizenship for diversity purposes since a state has no legally cognizable interest in the application of its law to a federal court's determination of subject matter jurisdiction.

On the other hand, subject to the requirements of the due process clause of the Fourteenth Amendment, the extent of a federal court's personal jurisdiction is determined by state law. *Davis H. Elliot Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176 (6th Cir. 1975). However, Southern does not contest personal jurisdiction, but

rather federal subject matter jurisdiction. Thus, petitioners' reliance on *Green v. Chicago, Burlington & Quincy R.R. Co.*, 205 U.S. 530 (1906) and *Buffalo Batt & Felt Corp. v. Royal Manufacturing Co.*, 27 F.2d 400 (W.D.N.Y. 1928) is misplaced. Both cases concern only the extent of the federal court's personal jurisdiction and, as such, are inapplicable to the case at bar.

Petitioners' reliance on *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1986) is also misplaced. In that case, the Court held that an Indiana securities act did not violate the Commerce Clause and was not preempted by a somewhat similar federal act. The issue of citizenship for purposes of diversity was not before the Court.

B. The Third Circuit's decision affirming the district court's dismissal of Southern for lack of diversity as required by 28 U.S.C. Section 1332 comports with the policy the statute was designed to serve.

Diversity of citizenship must be complete to confer jurisdiction under 28 U.S.C. Section 1332. *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978). As the court stated in *Northeast Nuclear Energy Co. v. General Electric Co.*, 435 F. Supp. 344, 346 (1977), "the purpose of diversity jurisdiction is to avoid the effects of prejudice against outsiders."

With respect to the citizenship of a corporate defendant, 28 U.S.C. Section 1332(c) provides:

> for purposes of this section and Section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

"This dual citizenship requirement was intended to *restrict* the availability of diversity jurisdiction in cases involving corporations . . . by denying federal court access to 'essentially local corporations which were incorporated in outside states' (citations omitted)." *Bonar, Inc. v. Schottland,* 631 F. Supp. 990, 993 (E.D. Pa. 1986) (emphasis in original). See also *Panalpina Welttransport GMBH v. Geosource, Inc.,* 764 F.2d 352, 354 (5th Cir. 1985) (A corporation will be considered a citizen of several places for purposes of diversity jurisdiction "in keeping with Congress' intendment to constrict the availability of diversity jurisdiction."); *Northeast Nuclear Energy Co. v. General Electric Co., supra,* 435 F. Supp. at 346 (The dual citizenship requirement of 28 U.S.C. Section 1332(c) was "designed to prevent an essentially local corporation from litigating its controversies with local citizens in federal courts."); *Kelly v. United States Steel Corp.,* 284 F.2d 850, 852 (3rd Cir. 1960) (28 U.S.C. Section 1332(c) "is, as appears in its legislative history, an effort to reduce the number of cases coming to federal courts on the ground of diversity of citizenship only.")

Petitioners, residents and citizens of Pennsylvania, sought to initiate suit against Southern in federal court rather than state court, presumably in hopes of obtaining an earlier trial date. Whatever motivated petitioners' choice of forum, it is clear beyond cavil they have not sought to adjudicate their claim in federal court "to avoid the effects of prejudice against outsiders." Thus, the Third Circuit's affirmance of the district court's decision in the case at bar comports with the policy which Section 1332(c) was designed to serve: the reduction of the number of diversity cases in federal court.

C. The Third Circuit's decision is consistent with previous appellate and district court decisions.

Petitioners' third argument is based upon the proposition that the Third Circuit's decision is inconsistent with other circuit court decisions. Petitioners cite a number of cases which supposedly illustrate four inconsistent approaches or "tests" used by federal courts to determine a corporation's principal place of business.[3] Despite petitioners' chimeric categorization, the cases cited are in no way inconsistent with the Third Circuit's decision in the case at bar.[4] Indeed, all the cases cited by petitioners, including the Third Circuit's decision in the case at bar, stand for the same proposition: a corporation's principal place of business is in that state where its presence is

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[3] These are the so-called "state of incorporation" test, the "forum of last business activity" test, the "forum of last principal business activity" test and the "forum of corporate conclusion" test.

[4] Pursuant to Supreme Court Rule 10.1(a) certiorari may be appropriate "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter", not when there is merely an alleged "inconsistency of opinion expressed by the circuit courts". (Petitioners' brief p.7). Thus, even assuming *arguendo* the district court opinions upon which petitioners rely are inconsistent with the instant case, such may not constitute a ground for granting certiorari. Moreover, as set forth herein, the three appellate court cases cited by petitioners, *Gavin v. Read Corporation*, 356 F.Supp. 483 (E.D. Pa. 1973), *aff'd.* 523 F.2d 1050 (3d Cir. 1975), *Riggs v. Island Creek Coal Company*, 387 F.Supp. 1363 (S.D. Ohio 1974), *rev'd on other grounds*, 542 F.2d 339 (6th Cir. 1975) and *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556 (9th Cir. 1987), are consistent with the Third Circuit's opinion in the instant case.

strongest; conversely, a corporation's principal place of business will not be found to be in a state where it conducts no business whatsoever. Moreover, *by petitioners' own admission*, the only other appellate court decision regarding the principal place of business of a corporation whose sole current business activity consists of managing litigation to which it is a party, *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556 (9th Cir. 1987), is entirely consistent with the Third Circuit's decision in the instant case (Petitioners' brief p. 15).

1. The cases cited by petitioners in support of the purported "State of Incorporation" test are distinguishable from the case at bar.

Petitioners cite *Gavin v. Read Corp.*, 356 F. Supp. 483, (E.D. Pa. 1973), *aff'd.*, 523 F.2d 1050 (3d Cir. 1975) and *Sanders Plumbing Co. v. B.B. Anderson Const. Co.*, 660 F. Supp. 752 (D. Kan. 1987) for the proposition that some courts have determined that an inactive corporation has no principal place of business and, as such, is only a citizen of its state of incorporation. However, *Gavin* and *Sanders* are distinguishable from the case at bar and, therefore, may not be considered inconsistent therewith.

In *Gavin v. Read Corp., supra*, defendant Read moved to dismiss for lack of diversity on the ground its principal place of business was in Pennsylvania, the same state in which the plaintiff resided. The court determined Read's principal place of business was not in Pennsylvania because at the time plaintiff's complaint was filed, Read was not conducting any business in Pennsylvania and

was not yet a wholly owned subsidiary of a Pennsylvania Corporation.

As the Third Circuit correctly held, the case at bar is clearly distinguishable from *Gavin* since petitioners in the instant case have not and cannot establish that Southern was an inactive corporation at the time petitioners' complaint was filed (A-14).[5] Indeed, the Third Circuit correctly recognized that the evidence establishes that Southern is an active corporation involved in the prosecution and defense of numerous asbestos related lawsuits and that all corporate decisions regarding said litigation are made by Southern in Pennsylvania (A-15).

The instant case is also distinguishable from *Gavin* since at the time petitioners' complaint was filed, Southern was a wholly owned and controlled subsidiary of H.K. Porter Company, Inc., a Pennsylvania Corporation.[6] Furthermore, even assuming that *Gavin* is inconsistent with the instant case, such may not constitute a ground for granting certiorari since both cases were decided by

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[5] A party who seeks to establish subject matter jurisdiction has the burden of proving all of the facts required to sustain it. *Thomas v. Gaskill*, 315 U.S. 442 (1942). Moreover, diversity of citizenship for purposes of subject matter jurisdiction is determined as of the time of the filing of the complaint. *Gilbert v. David*, 235 U.S. 561 (1914). Thus, petitioners were required to establish that Southern did not have its principal place of business in Pennsylvania on December 5, 1988, the date their complaint was filed.

[6] Where the parent corporation makes all business decisions and completely dominates the subsidiary, the subsidiary's principal place of business is that of the parent. See Section D, *infra*.

the Third Circuit. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (conflicting decisions from the same appellate court "should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification").

Petitioners' reliance on *Sanders Plumbing Co. v. B.B. Anderson Const. Co., supra,* is similarly misdirected. In that case, the court refused to find that one of the defendant's principal places of business was in Missouri where the evidence failed to demonstrate the defendant conducted any business whatsoever in that state.

In essence, both *Gavin* and *Sanders* stand for the proposition that a corporation's principal place of business may not be deemed to be in a state where it conducts no business activity whatsoever. Since the court's decision in the case at bar finding Southern's principal place of business to be in Pennsylvania was based upon its finding that all of Southern's business activities are centered in Pennsylvania and all of its affairs are conducted from Pennsylvania, the instant case is not inconsistent with either *Gavin* or *Sanders*.

2. The cases supporting petitioners' purported "Forum of Last Business Activity" test are consistent with the case at bar.

Petitioners cite *Comtec, Inc. v. National Technical Schools*, 711 F. Supp. 522 (D.Ariz. 1989) and *Wm. Passalacqua Builders v. Resnick Dev. South*, 608 F. Supp. 1261 (S.D.N.Y. 1985) for the proposition that some courts have determined that an inactive corporation's principal place of business is in the state where the corporation last

conducted business. As with *Gavin* and *Sanders*, both *Comtec* and *Wm. Passalacqua* involved inactive corporations and as such are distinguishable from the case at bar.

Specifically, in *Comtec, Inc. v. National Technical Schools, supra*, plaintiff, a Nevada corporation, brought suit against a California defendant. Defendant removed the case to federal court based on diversity and plaintiff moved to remand on the ground that it too was a citizen of California by virtue of having its principal place of business in that state. The court held plaintiff's principal place of business to be in California since the evidence established that plaintiff's last business activity, including all corporate activity regarding the winding down of its affairs after it had ceased active business operations, took place in California.

Even accepting petitioners' bald, conclusory and incorrect contention that Southern is active in Pennsylvania solely for the purpose of closing out its affairs, the Third Circuit's decision in this case is consistent with *Comtec* since the evidence establishes that all of Southern's decisions regarding said affairs are made by Southern in Pennsylvania.

Petitioners' reliance on *Wm. Passalacqua Buildings v. Resnick Dev. South, supra*, is likewise misdirected. In that case, the court held that an inactive defendant corporation's principal place of business did not exist in a particular state merely because the corporation conducted litigation in that state absent a showing of other business activity there or a showing that corporate decisions regarding said litigation were also made in that state.

Like *Gavin* and *Sanders, Wm. Passalacqua* stands for the proposition that a corporation's principal place of business may not be deemed to be in a state where it conducts no business activity.

3. The cases supporting petitioners' purported "Forum of Last Principal Business Activity" test are consistent with the case at bar.

Petitioners cite *National Spinning Co. v. The City of Washington, North Carolina,* 312 F. Supp. 958 (E.D.N.C. 1970) and *Riggs v. Island Creek Coal Co.,* 387 F. Supp. 1363 (S.D. Ohio 1974), *rev'd. on other grounds,* 542 F.2d 339 (6th Cir. 1976) for the proposition that some courts have ignored the location of the corporation's "corporate" management activity in determining its principal place of business and looked only to the state where its principal business activity is located. However, even a cursory reading of those cases will reveal that they both stand for the same proposition: the location of the corporation's day-to-day activity and management determines its principal place of business. As such, both cases are consistent with the case at bar and with every other decision cited by petitioners.

In *National Spinning,* plaintiff, incorporated in New York, brought a diversity action against a North Carolina defendant. Defendant moved to dismiss for lack of diversity on the ground that plaintiff's principal place of business was in North Carolina and, therefore, it too was a citizen of that state. The evidence established that while much of plaintiff's corporate policy and planning took place in New York, the management of the daily on-going

affairs of actually running the business took place in North Carolina. Indeed, the district court specifically recognized that "it is apparent that the management of the daily on-going affairs of running the business . . . is carried out within the state of North Carolina." *Id.* at 960. Thus, the court held the corporation's principal place of business to be in North Carolina.

The rule set forth in *Riggs v. Island Creek Const. Co., supra,* is essentially the same. In *Riggs,* an Ohio plaintiff brought suit against a mining company whose corporate headquarters were in Ohio but whose day-to-day mining operations took place in other states. Defendant removed the case to federal court and thereafter moved to dismiss for lack of diversity. In denying defendant's motion to dismiss, the district court determined defendant's principal place of business was not in Ohio since most of its day-to-day mining operations were conducted in other states.

On appeal, the Sixth Circuit affirmed the district court's jurisdiction under an estoppel theory. However, the Sixth Circuit also held that the district court's negative finding that defendant's principal place of business was not in Ohio was insufficient to establish the court's jurisdiction in light of the fact there was no evidence as to precisely how much business defendant conducted in other states. The court held that where the corporation's operations are divided among many states "its office from which supreme direction and control of the business generally is had, including the operations of the several plants, may, and perhaps must, be deemed the principal place of business." *Riggs v. Island Creek Coal Co., supra,*

542 F.2d at 342 citing *Continental Coal Corp. v. Roszelle Bros.*, 242 F.243 (6th Cir. 1917).

Thus, petitioners' contention that *National Spinning* and *Riggs* "specifically exclude[ ] in certain instances, consideration of "corporate" (management) activity as the site of the principal place of business" (Petitioners' brief p.14) represents a fundamental misunderstanding of both of those cases. As set forth above, the court's holding in *National Spinning* that plaintiff corporation was a citizen of North Carolina was based in part upon its finding that management of the corporation's day-to-day affairs took place in that state. Similarly, in *Riggs*, the Sixth Circuit found that where a corporation does business in many states, the location of corporate offices "may, and perhaps must, be deemed the principal place of business."

The Third Circuit's holding in the instant case is consistent with *National Spinning* and *Riggs* since the undisputed evidence in the case at bar establishes that both Southern's daily business activity and its center of corporate control are located in Pennsylvania.

4. A corporation whose sole activity consists of managing litigation has its principal place of business in the state where corporate decisions regarding said litigation are made.

Petitioners cite *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556 (9th Cir. 1987) and the Third Circuit's decision in the case at bar for the proposition that some courts have "redefine[d] current activity and give weight in determining the viability of a corporation

whose current activities cut across the grain of standard notions of business purpose and profit." (Petitioners' brief p.15). Whatever petitioners' contention, *Co-Efficient* and the instant case stand for the proposition that a corporation whose sole, current business activity consists of managing litigation to which it is a party has its principal place of business in the state where corporate decisions regarding said litigation are made.

In *Co-Efficient*, plaintiff was a Nevada corporation initially formed to generate tax benefits through the buying and selling of energy management systems. However, at the time of the filing of the complaint in that case, Co-Efficient's sole business activity consisted of prosecuting a lawsuit in California. The court held Co-Efficient's principal place of business to be in California and granted the defendant's motion to dismiss for lack of diversity because the business decisions regarding the prosecution of said lawsuit were made by Co-Efficient in California.

As noted by petitioners, the Third Circuit's decision in the case at bar is entirely consistent with the Ninth Circuit's decision in *Co-Efficient* (Petitioners' brief p. 15).

D. The issue of whether the Third Circuit adopted an inconsistent "test" in determining Southern's principal place of business is moot since under any of petitioners' purported "tests" Southern's principal place of business is in Pennsylvania because it is a wholly owned and controlled subsidiary of H.K. Porter Company, Inc., whose principal place of business is in Pennsylvania.

Where the parent corporation makes all business decisions and completely dominates the subsidiary, the

subsidiary's principal place of business is that of the parent. A review of the facts of record in this matter, as demonstrated by the deposition (A-19 - A-27) and declaration (A-29 - A-31) of Mr. Howes, reveals that although Southern has maintained its proper corporate separateness, it is dominated by its Pennsylvania parent.

In *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 558 (5th Cir. 1985), the court held that "When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes." In so ruling, the court recognized that such a rule "furthers the intent of congress 'to minimize and reduce the caseload of federal courts based upon diversity' (citations omitted)." See also *Panalpina Welttransport GMBH v. Geosource, Inc., supra*, 764 F.2d at 354 (" . . . in keeping with Congress' intendment to constrict the availability of diversity jurisdiction . . . the alter-ego doctrine may be used to add places of citizenship to the abrogation of diversity but may not be used to extend such jurisdiction.")

Similarly, in *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980), Georgia plaintiffs brought a diversity action against a Delaware corporation which did business in Georgia but which was owned and operated by a corporation, B&W, whose principal place of business was in Texas. The appellate court held that the defendant's principal place of business was in Texas since it was "essentially run" by its parent corporation, B&W, whose principal place of business was in Texas, *Id.* at 314-315. In that case, the evidence established that B&W's officers, directors and shareholders were also the officers, directors and shareholders of defendant, that said officers were domiciled in Texas, that all major business policy

decisions were made in Texas and that the defendant's corporate records were maintained in Texas.

In *Frazier, III v. Alabama Motor Club, Inc.*, 349 F.2d 456 (5th Cir. 1965), plaintiffs brought a diversity action against defendants in Georgia district court and defendants moved to dismiss for improper venue. In analyzing defendants' contacts with the forum and the propriety of venue, the court determined that defendants were integrated subsidiaries of a parent corporation, National, whose principal place of business was in Georgia. As such, defendants' principal place of business was also found to be in Georgia. The court's holding was based upon its finding that:

> The corporate and business activities of each of the defendants, except the solicitation of memberships, are centered in the offices of National in Atlanta. These business activities are managed, directed and completely controlled by National under the administration of its officers.

Id. at 460.

Specifically, the evidence established that National's officers and directors were also the officers and directors of defendants; National made substantially all of the business decisions for defendants; National owned most of defendants' stock; defendants' board meetings were held at the offices of National; and defendants' record were kept at the offices of National.

The facts of the case at bar are materially indistinguishable from those of the cases cited above. Southern is the wholly owned and controlled subsidiary of Porter, whose principal place of business is indisputably

in Pennsylvania (A-20, A-21 and A-30). Each of Southern's current officers and directors are also officers and directors of Porter, each is employed by Porter in Porter's Pittsburgh, Pennsylvania office (A-30) and each is a resident of Pennsylvania (A-29). All of Southern's corporate decisions and business activities occur in the offices of Porter in Pittsburgh, Pennsylvania (A-30). Moreover, Southern's officers' and directors' and shareholders' meetings are held at the offices of Porter and Southern's books, records and minutes are kept at the Porter offices in Pittsburgh, Pennsylvania (A-30).

Based upon the foregoing, Southern respectfully submits that the Third Circuit and the district court below correctly concluded that Southern's principal place of business is in Pennsylvania for purposes of federal subject matter jurisdiction.[7] Moreover, since Southern is wholly owned and controlled by H.K. Porter Company, Inc., its principal place of business is in Pennsylvania regardless of which of petitioners' "tests" is applied. Therefore, the issue of whether an inconsistent "test" was adopted by the court in this case, as contended by petitioners, is moot.

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[7] The district court's opinion finding Southern's principal place of business to be in Pennsylvania was for the most part based upon the fact that it is a wholly owned and controlled subsidiary of H.K. Porter Company, Inc. whose principal place of business is in Pennsylvania. *McNamee v. The Celotex Corp.*, No. 88-9259 (E.D. Pa. July 12, 1989) (A-4 - A-6). While the Third Circuit did not expressly reach the domination issue, it did so implictly since it based its holding on the fact that all of Southern's business activities are conducted from Pennsylvania (A-15).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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